United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-2281

To be argued by
CONSTANCE M. VECELLIO

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2281

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—*against*—

PENT-R-BOOKS, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Preliminary Statement

This case involves 20 appeals by defendant Pent-R-Books from orders of the United States District Court for the Eastern District of New York (Dooling, *J.*) entered between July 18 and July 26, 1974 in actions brought to enforce postal prohibitory orders issued pursuant to the Pandering Law (hereinafter "the statute"), 39 U.S.C. § 3008 (formerly 39 U.S.C. § 4009.) The orders of the District Court granted plaintiff's motions for summary judgment and commanded the defendant to comply with the postal prohibitory orders by refraining from further mailings to the named addresses, by deleting the named addressees from mailing lists owned or controlled by defendant, its agents, or assigns, and by refraining from any sale, rental, exchange or other transaction involving mailing lists bearing the name of the said addressees. (These district court orders are "compliance orders" issued pursuant to subsection (e) of § 3008.)

On this appeal, defendant contends that the compliance orders were invalid for a number of reasons, some common to each of the orders; others unique; and some common to a few of the orders. Defendant contends that the violative mailings in the cases-at-bar, were "involuntary", and that it has subsequently made major changes in its method of operations so that the chances that any one of the twenty addresses involved in the cases-at-bar will receive another mailing from defendant are negligible. Plaintiff does not contest that defendant has made changes in its method of operations as a result of the enactment of the Pandering Law, but asserts that that fact does not negate the necessity of the compliance orders entered by the District Court in the cases at bar. Defendant has also raised a plethora of other issues including the constitutionality of the Pandering Law, the admissibility in evidence of certified copies of the administrative records, and various procedural points.

Statement of Facts

The Pandering Law was enacted because of Congressional concern "with the use of mail facilities to distribute unsolicited advertisements that recipients found to be offensive because of their lewd and salacious character. Such mail was found to be pressed upon minors as well as adults who did not seek and did not want it. Use of mailing lists of youth organizations was part of the mode of doing business. . . . A declared objective of Congress was to protect minors and the privacy of homes from such material and to place the judgment of what constitutes an offensive invasion of those interests in the hands of the addressee." *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 731-732 (1970). Congress indicated, in enacting this statute, that the statute was an attempt to protect the right to privacy to which

each individual is entitled under the Constitution by allowing each individual to ensure that offensive matter cannot be mailed into his very home. (See p. 10, *infra.*)

The scheme of the statute allows an addressee who has received an offensive mailing to request that the Postal Service enter a prohibitory order directing the sender to refrain from any further mailings to that addressee. A second mailing after the effective date of that prohibitory order enables the Attorney General, or his designee, to apply to a district court for a compliance order which likewise directs the sender to make no further mailings but which, unlike the prohibitory order, carries a possible sanction.

The cases at bar involve twenty individual addressees who received in their homes unsolicited advertisements which they found to be offensive from defendant Pent-R-Books. (Defendant Pent-R-Books is a large scale mailing house located in Brooklyn, New York and specializing in sexually-oriented material.) It is undisputed that each of the individual addressees requested the Postal Service to enter a prohibitory order directing the defendant to refrain from further mailings to him. It is also undisputed that a second mailing was made to each addressee, who subsequently complained to the Postal Service. Notations of the *date of receipt* of the second mailing by the addressees are contained in the administrative records, which were submitted by the Government in support of its motions for summary judgment. Because defendant neither dated its envelopes nor maintained any records of mailing dates, the record contains no evidence as to date of mailing itself.

Defendant, though not denying that the violative second mailings were made after the effective dates of the prohibitory orders, objects to the evidence used by Government as to date of receipt of these mailings by individual addressees.

These cases involve an attempt by the twenty individuals involved to make use of the statutory scheme designed to provide them with an easy method of preventing offensive mailings from coming into their homes. Defendant launches a multitude of attacks on the simple statutory scheme, and implies in its brief that enforcement of this statute is not in the public interest because the majority of the population would not find defendant's brochures offensive. But the statute is designed to allow each individual to control the intrusion of material which *he* finds offensive. Furthermore, while this consolidated appeal involves only twenty cases, there are presently pending in the Eastern District of New York three hundred and forty-one actions brought against Pent-R-Books. Other violations have been referred to the Attorney General but not yet commenced as civil actions. Obviously the right of the district court to enter compliance orders in these cases is not a "moot" question, as defendant suggests. Rather, that right is intimately concerned with the right of privacy asserted by the individual addressees herein.

The Statute

§ 3008. Prohibition of pandering advertisements

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the

character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postal Service shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addresses, effective on the thirtieth calendar day after receipt of the order. The order shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents, or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

(d) Whenever the Postal Service believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, it shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for its belief and request that any response thereto be filed in writing with the Postal Service within 15 days after the date of such service. If the Postal Service, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, it is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punishable by the court as contempt thereof.

(f) Receipt of mail matter 30 days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postal Service shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5, relating to administrative procedure, and chapter 7, relating to judicial review, of title 5, shall not apply to any provisions of this section.

(i) For purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postal Service, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postal Service's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.

ARGUMENT

POINT I

The District Court did not abuse its discretion by issuing orders in the cases at bar commanding compliance with the postal prohibitory orders.[1]

Defendant argues that because its violations of the twenty postal prohibitory orders involved in this consolidated appeal were not voluntary, it was reversible error for the district court to issue orders commanding that defendant comply with the terms of the prohibitory orders. Defendant bases its claim of involuntariness on the fact that its mailing lists are placed on computers and that it is thus impossible for defendant to avoid second mailings to the same person when there is some slight variation between the name and address under which the individual requested a prohibitory order and under which he received a second mailing. For example, in 69 C 1362, the prohibitory order forbade further mailings to L. Ireland, 3 Mill Street, Bloomfield, New Jersey 07003 (7a);[2] the violative mailing was to L. R. Ireland at the above address (16a). Thus, while a reasonable man would have concluded that L. Ireland at 3 Mill Street in Bloomfield, New Jersey and L. R. Ireland at 3 Mill Street in Bloomfield, New Jersey were likely to be one and the same person, defendant contends that there is no way to program that conclusion into a computer, and, thus, that any such violations were involuntary.

For the proposition that such involuntariness converts the issuance of compliance orders by the district court

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[1] Points I and II of defendant's brief are discussed herein.

[2] References of this type are references to the Consolidated Joint Appendix filed by defendant.

into reversible error, defendant relies upon *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). However, in that case the Supreme Court simply reversed the holding of the Court of Appeals that the district court had no discretion to refuse to grant an injunction against future violations of the Emergency Price Control Act when it was conceded that the defendant had engaged in such violations in the past. The section of the Emergency Price Control Act at issue provided that the district court should grant "a permanent or temporary injunction, restraining order, *or* other order. . . ." 321 U.S. at 322. (Emphasis added.) As Justices Frankfurter and Harlan noted in a later decision, the Court in *Hecht* had "emphasized the alternative character of this provision for an 'other order' as imparting to the District Court discretion to withhold an injunction. 321 U.S. at 328." *Steelworkers* v. *United States*, 361 U.S. 39, 59 (1959), Frankfurter and Harlan, concurring. The wording of the Pandering Law, like the wording of the Labor-Management Relations Act in *Steelworkers*, and in contrast to the provisions at issue in *Hecht*, makes clear that the District Court has no discretion to *not* issue a compliance order. In fact, the issuance of a compliance order is the only relief the court is authorized to give. Section (e) reads, in pertinent part, as follows:

> (e) Any district court . . . shlal have jurisdiction . . . to issue an order commanding compliance with such notice. 39 U.S.C. § 3008(e).

Assuming, however, that such discretion exists under the Pandering Law, the district court exercised that discretion by issuing compliance orders. *Hecht Co.* v. *Bowles* is simply an affirmation of the fact that the *district court* possesses discretion. "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973).

Defendant first states that, like the defendant in *Hecht*, it has made all possible attempts to bring itself into compliance with the law and that "the issuance of an injunction would not and could not have any effect of insuring better compliance in the future." (Defendant-appellant's brief, p. 13). In *Hecht*, the Supreme Court emphasized that the *district court* "had concluded that the issuance of an injunction would have 'no effect by way of insuring better compliance in the future' . . ." 321 U.S. at 326. In the cases at bar, however, the district court found that "[d]efendant's liability to subjection to individual Compliance Orders of court is the begetter of defendant's praiseworthy compliance effort . . ." (93a). Thus, the district court determined that the issuance of compliance orders *was* necessary to ensure future compliance.

Secondly, defendant argues that, as in *Hecht*, the granting of compliance orders would not be in the public interest. While upholding the power to deny an injunction in *Hecht*, the Supreme Court noted that "discretion under § 205(a) must be exercised in light of the large objectives of the Act. For the standards of public interest . . . measure the propriety and need for injunctive relief in these cases." 321 U.S. at 331. The Court emphasized that the district court had held that the issuance of an injunction would *not* be in the public interest. 321 U.S. at 326. (The Court also specifically left open the question of whether the district court had abused its discretion by dismissing the complaint. 321 U.S. at 331.) Defendant asserts that the issuance of compliance orders is not in the public interest in the cases at bar since "the worst consequence that would follow . . . would be, conceivably, that another mailing would be made . . ." (Defendant-appellant's brief, p. 13).

But preventing that very consequence *is* the "large objective" of the Pandering Law, and it is the "large

objective" of the Pandering Law which determines the "public interest" in the context of the cases-at-bar. In *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970), the Supreme Court held that the Pandering Law was "a response to public and congressional concern with use of the mail facilities to distribute unsolicited advertisements that recipients found to be offensive because of their lewd and salacious character," 397 U.S. at 731, and that a "declared objective of Congress was to protect minors and the privacy of homes from such material . . ." 321 U.S. at 732. The Senate Report accompanying the original enactment of the Pandering Law stresses that it "gives to each mail recipient the means to prevent the repeated mailings to him of advertisements . . ." Sen. Rep. No. 801, 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Admin. News, p. 2294. The Senate Report recognizes the right of privacy "which each citizen has under the Constitution" and that that right is "entitled to protection". *Id.* The Report stresses that the Government "should not act as the instrumentality by which unwanted and unsolicited mail matter is forced upon an unwilling citizen." *Id.* at 2295.

Defendant argues that, because only a small *per cent* of sexually oriented advertising results in prohibitory orders, public interest in the issuance of compliance orders is lacking and "the doctrine of *de minimis* would seem to preclude the issuance of any injunction here." (Defendant-appellant's brief, p. 14). Defendant seems to forget that each of the twenty compliance orders issued by the district court in the cases at bar simply orders that defendant cease mailing to one specific individual who has indicated that he is offended by defendant's mailings and does not wish to receive them. The right of each *individual* to govern what mail may enter his home is not determined by what the *majority* finds acceptable. In the cases at bar, the district court noted that "the specific

relief to which each offended addressee is entitled . . . is an order of court imposing on the mailer the specific duty, culpable disobedience of which will be punishable by contempt, to avoid future mailings. The Government does not seek to subject defendant, as a systematic violator of Prohibitory Orders, to a general injunction . . ." (94a).

The relief granted by the district court was the only possible relief to the individuals whom the statute was enacted to protect. The district court emphasized that the "denial of the injunction in *Hecht* did not mean that Hecht was not liable to refund the overcharge of each customer." (93a). In *Hecht*, the Supreme Court emphasized that "[p]etitioner undertook to make repayment of all overcharges brought to light by the investigation in case of customers who could be identified." 321 U.S. at 326. Defendant argues that the addressees in the cases at bar had alternate relief available in the form of discarding "the second mailing into the nearest waste basket." (Defendant-appellant's brief, p. 12). But that "relief" like other relief suggested by defendant, does not prevent the evil the statute was designed to prevent—*i.e.*, the intrusion into the addressees' homes of unwanted literature. Furthermore, as the Supreme Court pointed out in *Rowan* the householder should not "have to risk that offensive material come into the hands of his children before it can be stopped." 397 U.S. at 738.

Finally, defendant argues that the district court erred in granting compliance orders against it because they were "unjust." In *Hecht* the district court had found that the issuance of an injunction would be unjust. 321 U.S. at 326. The district court made no such finding in the cases at bar. However, it did note that "Compliance Orders of court are not punitive but directory; they simply lay the groundwork for future contempt proceed-

ings." (92a-93a). The district court indicated that compliance efforts would be considered in mitigation of any contempt adjudication (93a, 100a).

Defendant, in arguing in Point II of its brief, that no case or controversy is presented by the cases at bar, raises again the issues raised in Point I. First defendant argues that there is no case or controversy because it is so unlikely that any of the twenty individuals involved here will receive another mailing from defendant. Defendant concludes that these twenty individuals are statistically insignificant, since "only 0.015% of a person would stand a statistical chance of ever receiving another mailing from the defendant." (Defendant-appellant's brief, pp. 15-16). But this is the same argument defendant raised to support its contention that the issuance of compliance orders was not in the public interest—and the answer is again that, upon the occurrence of a violative second mailing, the statute authorizes the issuance of a judicial compliance order to protect the offended *individual*. As the district court stated, "The statute is concerned with the interest of the individual addressee and does not seek to regulate the business of the publisher of the advertisements." (100a). Defendant, which continuously informs us that a computer "functions more effectively than humans could possibly function," (defendant-appellant's brief, p. 13), forgets that both the Constitutional right to privacy and the statutory right to freedom from intrusive advertising are rights which must necessarily accrue to an individual human being. Defendant's statistics, rather than proving that there is no case or controversy, merely establish that defendant is quite unlikely ever to be held in contempt of any of the compliance orders.

As the second prong of its "no case or controversy" argument, defendant raises again the argument that compliance orders can have no practical effect in the cases at

bar. But the district court found otherwise, stating that it was the possibility of the entrance of such orders which was "the begetter of defendant's praiseworthy compliance effort . . ." (93a).

The district court did not commit an abuse of discretion in entering compliance orders in the cases at bar.

POINT II

The mailing of advertisements to persons who have previously indicated that they found the advertisements offensive is not a constitutionally protected right.[3]

Congress, in enacting the Pandering Law, indicated clearly that it was balancing the right to use the mails against "an equally important right which each citizen has under the Constitution, the right of privacy, which is also entitled to protection." Sen. Rep. No. 801, 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Admin. News, p. 2294.

In *Rowan* v. *United States Post Office Department*, *supra*, the Supreme Court expressed its agreement with the Congressional determination that the Pandering Law was constitutionally sound. The Court noted that "[t]oday's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists . . . have changed the mailman from a carrier of primarily private communications . . . and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted material into every home." 397 U.S. at 736. The Court cate-

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[3]Points III, VII, and XIV of defendant's brief are discussed herein.

gorically rejected "the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." 397 U.S. at 738. Yet it is this right to send unsolicited material into the home of another which the defendant now claims as its constitutional right.

Defendant asserts that the Supreme Court, in declaring the scheme of the Pandering Law to be constitutional in *Rowan*, did not consider the "operation and effect of the statute," since *Rowan* was decided a few days after the Pandering Law took effect. (Defendant-appellant's brief, p. 18). For example, defendant asserts that the statute, to avoid an unconstitutional infringement of defendant's rights, must be construed not to apply to names on rented lists. (Defendant-appellant's brief, p. 17). But in *Rowan*, the Court specifically indicated that it viewed the use of mailing lists as one of the evils at which the statute was aimed. To hold that the statute does not apply to names on rented lists would be to hold that persons whose names happen to appear on rented lists cannot assert the "right of every person to be let alone. . . ." 397 U.S. at 736. Defendant unquestionably has a right to do business, but it would be a strange balancing of relative rights to determine that, rather than finding other ways of doing business, defendant may invade the privacy of persons whose names happen to appear on rented lists. Defendant alleges that it is impossible to remove names from a rented list. (Defendant-appellant's brief, p. 6). But defendant could, for example, pay the cost of having the necessary names removed from a rented list before it is used by defendant. In *Rowan*, the appellants contended that the requirement of the Pandering Law that names be removed from mailing

lists was confiscatory because of the costs involved. However, the Supreme Court agreed "with the conclusion of the District Court that the burden does not amount to a violation of due process guaranteed by the Fifth Amendment of the Constitution. Particularly when in the context presently before this Court it is being applied to commercial enterprises." 397 U.S. at 740.

Defendant similarly asserts that the failure of Congress, in enacting the Pandering Law, to require that the offended addressee supply alternative name formulations, "with the provision that only those name formulations could not be mailed to . . .," (defendant-appellant's brief, p. 17), converts the law into an unconstitutional infringement of defendant's rights. But the Supreme Court in *Rowan* put to rest the argument that defendant has a constitutional right "to send unwanted material into the home of another," and that is all the statute prohibits. While the supplying of alternative name formulations might be a laudable suggestion which would enable defendant to incur less expense in avoiding mailings to offended addressees, it is not constitutionally required. The Pandering Law does not involve, as did *Blount* v. *Rizzi*, 400 U.S. 410 (1971), on which defendant relies, a governmental attempt to regulate obscenity. Likewise, *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 296 (1961) and *Shelton* v. *Tucker*, 364 U.S. 479 (1960), cited by defendant, are inapposite since they involve the balancing of a fundamental constitutional right—freedom of association—against a governmental aim of less than constitutional dimensions. In the cases at bar, the constitutional right of privacy of the individuals involved is being balanced against the expense which defendant must incur to avoid invading that right.

Defendant next contends that the statute is unconstitutional because, as applied to defendant, it involves the

penalization of non-willful mailings of "advertisements protected by the First Amendment." (Defendant-appellant's brief, p. 17.). Defendant cites *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), for this proposition. But defendant overlooks the fact that, unlike the plaintiff in *Time, Inc.* v. *Hill*, it cannot assert a First Amendment right since any mailing for which a compliance order would be issued would involve the constitutionally unprotected sending of "unwanted material into the home of another." Furthermore, the question involved in the cases at bar is not the "penalization" of defendant but merely the entry of compliance orders which defendant may or may not violate in the future. (Defendant itself admits, at p. 27 of its brief, that "nothing can happen to a mailer unless and until it violates the judicial compliance order.") The district court indicated that, if a violation did occur, evidence of lack of willfulness "could well be offered in mitigation of the charged violation of the Compliance Order, or, conceivably, to avoid altogether a contempt adjudication." (100a).

Finally, defendant asserts, in Point VII of its brief, that the statute is unconstitutional because "the Government acts as censor." Defendant bases this assertion on the affidavit of counsel, who alleged that he had "received information" that postal prohibitory orders had been obtained against the American Civil Liberties Union and the Practicing Law Institute but that the Postal Service had never sought a compliance order from a court against either of these institutions "even when there has been a violation of the P.O." (Defendant-appellant's brief, p. 26). (The affidavit contains no assertion that the affiant has "received information" that there were in fact violations of prohibitory orders by these institutions. Nor is the affidavit based on personal knowledge, as is required by Rule 56(e) of the Federal Rules of Civil Procedure.) Defendant asserts that such conduct constitutes govern-

mental censorship within the meaning of *Blount* v. *Rizzi*, *supra*, and *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). But those cases involved "schemes of administrative censorship" whereby a governmental official had the duty of determining what incoming mail should be detained and not delivered, either because it was determined to be obscene, as in *Blount*, or to constitute foreign political propaganda, as in *Lamont*. Under the Pandering Act, however, only the *addressee* can determine that he does not wish to receive certain mail. The most that is alleged by defendant is that the Postal Service has refused to seek judicial compliance orders against two institutions. While the addressees in any cases in which the Postal Service refused to enforce a violation of a prohibitory order might conceivably have reason to complain that the Postal Service was refusing to enforce their rights to privacy, neither they nor anyone else could complain that such abstinence constitutes censorship.

But even assuming that such abstinence could constitute censorship "it does not appear that such episodes have occurred in circumstances or to an extent sufficient to support a claim that the administration of the statute has converted it into an instrument for Post Office censorship of mailings of sexually oriented advertisements." (96a-97a).

Finally, it should be noted that any judgment the Postal Service allegedly made as to the nature of the materials in these hypothetical cases where it refused to seek judicial compliance orders was *not* a judgment that those materials were not obscene and that materials in cases where it did seek compliance orders *were* obscene. No such judgment would have been necessary since defendant admitted in its affidavit that neither the American Civil Liberties Union nor the Practicing Law Institute "mail any material which could conceivably be called

sexually provocative or erotically arousing." Thus, the defendant has simply posited hypothetical cases in which the Postal Service has declined to seek judicial compliance orders with respect to material which could not conceivably be called sexually provocative or erotically arousing—the only type of material to which the statute is supposed to apply. While the statute does leave the definition of what is "erotically arousing or sexually provocative to the "sole discretion" of the addressee, 39 U.S.C. § 3008(a), it does not *require* that the Postal Service seek judicial compliance orders for all alleged violations of prohibitory orders but merely *authorizes* it to "request the Attorney General to make application" for such orders. 39 U.S.C. § 3008(d). Thus, the Pandering Law is clearly constitutional, both as written and as applied in the cases at bar.

POINT III

The District Court did not commit error by holding that there was no genuine issue that the second mailings were received by the addressees on the dates indicated in the administrative records.[4]

A. The Use of the Administrative Records

It is well settled that a court may consider the certified copy of an administrative record on a motion for summary judgment. 6 J. Moore, Federal Practice ¶ 56.11[1.—8] at 2148 (1975). Defendant asserts, however, that in the cases at bar it was reversible error for the district court to consider the administrative records in deciding the motions for summary judgment which were made by both parties.

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[4] Points IV, V, VI, and parts C-J of Point VIII of defendant's brief are discussed herein.

In Point IV of its brief, defendant first challenges the use of the administrative records by attacking the validity of the certification[5] under Rule 44(a) of the Federal Rules of Civil Procedure. Defendant's main complaint seems to be that "all certifications were made by an official in Washington, D.C., though the persons having custody of the records are those in charge of 64 Postal Service Centers across the country." (Defendant-appellant's brief, p. 20).[6] However, the persons who certified the records were all employees of the Postal Service. As the First Circuit stated in *Yates* v. *United States*, 404 F.2d 462, 467 (1st Cir. 1969):

> "[a] custodian of records is not obliged to possess personal knowledge of the contents of the file. He need only authenticate its source."

Furthermore, Rule 902 of the Federal Rules of Evidence provides as follows:

> Self-authentication
>
> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of that United States . . . or of a political sub-

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[5] Defendant also argues at p. 19 of its briefs, that the records should not be considered in eight cases because copies of the certification were not served on defense counsel. It is clear, however, that these certifications were filed with the district court. See 12a, 588a, 1344a, 1440a, 1534a, 1624a, 1724a, and 1826a.

[6] Defendant cites as authority for this Vol. III, *Technical Report Of the Commission on Obscenity and Pornography*, a document which was certainly not "admitted into evidence" before the district court.

> division, officer, or agency thereof, and a signature purporting to be an attestation or execution.

All of the certifications in the cases at bar meet these requirements. (12a, 138a, 243a, 327a-329a, 426a, 508a, 588a, 684a, 776a, 876a, 992a, 1086a, 1168a, 1256a, 1344a, 1440a, 1534a, 1624a, 1724a, and 1826a).

As the district court pointed out in the cases at bar, "[d]efendant does not say that the administrative record is not a true copy of the record; since every instrument in it was communicated by copy to the defendant during the administrative proceeding defendant would not have any difficulty in pointing out any defect in the administrative record presented by plaintiff." (101a.) Defendant did not object to this part of the district court's opinion in its informal petition for a rehearing (121-123a), though it now claims that it did *not* receive certain parts of the records. It does appear to admit, however, at p. 19 of its brief, that it received copies of all prohibitory orders and complaints.

Defendant relies on *Celanese Corp. of America* v. *Vandalia Warehouse Corp.*, 424 F.2d 1176, 1179-1180 (7th Cir. 1970), wherein the district court had refused, at trial, to accept a document which "lacks the seal of any official of the United States Government." As pointed out above, all of the certifications in the cases at bar contain an official seal. Furthermore, *Celanese* merely involved a weather report and not an administrative record with which the defendant was familiar, having previously received copies.

B. The Admissibility of the Evidence as to Date of Receipt of the Second Mailings

Defendant next contends in Point V of its argument that, even if the administrative records are properly

certified, the evidence supplied therein by the addressees as to the date of receipt of the second mailing is inadmissible because it is hearsay.[7]

The hearsay objection is overcome by the business records exception formerly contained in 28 U.S.C. § 1732.[8] However, defendant contends that because "a letter from a third person which is found in the file of an addressee is not prepared by the addressee" it is "plainly not admissible as a business record of the addressee." (Defendant-appellant's brief, p. 22). Precisely this question was considered in *United States* v. *Lange*, 466 F.2d 1021 (9th Cir., 1972), wherein the Ninth Circuit held that the statements of the addresses were admissible as business records.[9] The court, in determining whether the statements were recorded "in regular course of any business" and whether it was "in the regular course of such business to make such memorandum or record," noted that "it is relevant to examine the content and method of preparation of the document sought to be introduced." 466 F.2d at 1024.

The court first analyzed whether the initial complaints[10] forwarded by the addressees met the necessary tests to

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[7] Defendant also attacks this evidence, at p. 22 of its brief, because it allegedly violates Rule 956.7(a) [sic] of the Post Office Rules of Practice, which requires that testimony be under oath. Apparently defendant means to refer to 39 C.F.R. § 916.7 (a), but that provision only applies to the conduct of *hearings*.

[8] The exception is now contained in Rule 803(6) of the Federal Rules of Evidence.

[9] Defendant also attacks these statements at pp. 22-23 of its brief, as being unsworn. But of course there is no requirement that entries in a business record be sworn to.

[10] Though defendant has not specifically objected to these as hearsay in the cases at bar, they would be equally suspect under the reasoning defendant presents.

make them business records. The court found that "the method by which these statements came into the administrative files is an inherently reliable standard operating procedure." *Id.* It noted that the only assertion involved was that the householder had *actually received* the advertising material which he claimed to find objectionable.

> "The sources of these records, then, are the complaining persons who acted on their own initiative to notify the Post Office. Such initiative was geared to a specific purpose, a demand that an agency of government perform a service which it is required by law to perform. 39 U.S.C. § 4009. These factors tend to insure that the person complaining did in fact receive the material." 466 F.2d at 1025.

The court stressed the evidenitary door should not be open

> "to every nosey bystander. However, the complainant's reports in the instant cases come to the courts in a far more legitimate posture. These are parties who ask that their government perform what it is required by law to do. This tends to insure that the method of preparation of these records is inherently reliable." *Id.*

The court applied the same analysis to the complainants' statements that a second mailing was received,[11] noting that

> "the complainants forwarded the objectionable second mailings to the Post Office. We are persuaded that the very act of forwarding the mate-

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[11] The effect of the use of a form of the type referred to in Point VI of defendant's brief, pp. 24-25, is not at issue in the cases at bar since there is no evidence of the use of such a form.

> rial is reliable indication that the administrative record of this act is within the business records exception," *Id.*

In addition, the statements are admissible under the "official statements" exception to the hearsay rule, codified in 28 U.S.C. § 1733, since "those who observed and recorded" the second mailing "acted as *ad hoc* officials" of the Postal Service. *La Porte* v. *United States*, 300 F.2d 878, 881 (9th Cir. 1962). See *United States* v. *Ward*, 173 F.2d 628, 629-630 (2d 1949), wherein the court stated "[w]hether there was a sufficient foundation for admission under [the business records statute] we need not decide, for, to the extent the entries were hearsay, they were admissible as 'official statements' made in the course of the entrant's official duties as employees of the United States."

C. The Existence of a Genuine Issue As To the Date of Receipt of the Second Mailings

Plaintiff introduced statements or notations in the administrative record establishing the date of receipt of the second mailing by the addressees. Rule 56(e) of the Federal Rules of Civil Procedure provides that defendant, in order to establish that there was a "genuine issue" as to this material fact,

> "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

See, *Waldron* v. *Cities Services Co.*, 361 F.2d 671 (2d Cir. 1966), aff'd sub nom *First National Bank of Arizona* v. *Cities Services Co.*, 391 U.S. 253 (1968).

Defendant failed, however, by affidavits or otherwise, to come forward with any "specific facts" showing that this was a genuine issue for trial. Defendant attacked plaintiff's evidence as "enshrined as an irrefutable truth" (defendant-appellant's brief, p. 23), without attempting to refute it.[12]

Furthermore, the defendant has never specifically denied that the second mailings were made after the effective dates of the prohibitory orders, and that is, ultimately, the only "genuine issue for trial" on this point. As the district court noted, "the defendant itself is the *best source of responsible evidence* about the date of mailing." (103a-104a) (emphasis added.) (The dates of *receipt* were of course, important only in establishing the dates of mailing.) But defendant came forward with no evidence, responsible or otherwise, to refute the proof offered by the plaintiff; in fact, defendant never specifically *denied* that the mailings were received on the dates indicated in the administrative records. The district court noted that "it would not be difficult for defendant, as one step in its scheme of compliance, to protect itself against imposition by dating its envelopes." (104a.) Defendant having failed to do so, or to in any other way refute the evidence contained in the administrative record as to the dates of receipt of the second mailings, the district court was correct in concluding there was no genuine issue as to those dates of receipt. As the court stated in *Langston* v. *Johnson*, 478 F.2d 915, 918 (D.C. Cir. 1973), "given the presumptive verity of the administrative record, it was necessary for appellant, in order to impeach the record at trial, to show that an issue as to its accuracy genuinely existed."

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[12] The record reflects no attempt by defendant to depose any of the addressees in the cases at bar.

Defendant attempts to raise the issue, in parts C-H of Point VIII of its brief, as to whether some of the dates noted in the administrative records are the dates on which the addressees received the offensive second, or, in one case third (146a), mailing, or the date of some other event. In connection with this argument, defendant also questions whether some of the date notations were made by the addressees themselves or by employees of the Postal Service based upon information supplied by the addressees.[13] But soon after all these notations were made, the defendant received a complaint from the Postal Service which referred to the date of receipt of the Prohibitory Order in question. The defendant had, of course, a right to an administrative hearing in these cases, and the issue of whether the date notations in the administrative record had been made by the addressees or Postal Service employees, and whether or not the date represented the date of receipt by the addressee, could have been raised at that hearing, which would normally take place within a few months of receipt of the complaint by the mailer. See 39 C.F.R. § 916.3 and 916.4. The forms of objections contained in the requests for hearings[14] sent to the Postmaster do not indicate that defendant intended to raise the issue of the meaning or method of inscription of the date notations in the administrative records. Indeed, defendant's request that all hearings be transferred to New York indicates a distinct lack of interest in the procedures used in the particular Post Offices where the complaints were filed and processed.[15] The district court

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[13] The latter situation would come squarely within the hearsay exception now contained in Rule 803(8)(C) of the Federal Rules of Evidence.

[14] The issue of whether defendant was improperly denied a hearing in some of the cases at bar is dealt with *infra* at pp. 30-32.

[15] See 179a, 284a, 378a, 464a, 542a, 635a, 733a, 820a, 935a, 1038a, 1124a, 1210a, 1300a, 1677a, 1777a, and 1881a. The one administrative hearing which was held took place in New York. See 1493a-1494a.

noted that, at the hearing, "[t]he defendant has the right to respond to the charge, to make an issue on the point, and at that juncture to come forward with evidence of mailing. . . . In the absence of affirmative evidence that the mailing was made before the effective date, the point is lost in this Court for the failure to raise it in the administrative proceeding in an easy, effective and satisfactory way." (107a-108a.)

The motions for summary judgment were decided several years after the event in question. Defendant itself noted that "upon trial, the memory of the complaining addressee as to the exact date of receipt of the second alleged mailing would certainly be no stronger today than it was three or four years ago, contemporaneous with the event. It would be foolish to waste the time of Court and counsel with any trial of this cause." (1199a.)

Thus, defendant, far from setting forth "specific facts showing that there is a genuine issue for trial," has conceded that a trial on the issue of the date of receipt of the second mailings would produce no evidence other than that put forth by the plaintiff in its motion for summary judgment.

The district court did not commit error by holding that there was no genuine issue as to the dates on which the second mailings were received by the addressees.

POINT IV

The District Court did not commit error by holding that there was no genuine issue that the second mailings were made more than thirty days after the effective dates of the prohibitory orders in the cases at bar.[16]

As defendant notes, the second mailings in these cases contain "neither postmark nor cancellation to show the date of mailing." (Defendant-appellant's brief, p. 28). Thus, the Government relied on the dates the mailings were received by the addressees together with the rebuttable presumption contained in subdivision (f) of the statute, that mail received a certain number of days after the prohibitory order was received by defendant was mailed after the effective date of that order. Defendant contends that it has a grace period of sixty days after receiving the prohibitory order before the rebuttable presumption takes effect. The district court held otherwise.[17]

The construction defendant puts on the statute would reward those mailers who put "neither postmark nor cancellation" on their material by giving them a sixty-day grace period, while only giving a thirty-day grace period to mailers who date their material. Congress would have no rational basis for making a distinction be-

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[16] Parts A and B of Point VIII of defendant's brief are discussed herein.

[17] As defendant points out in its brief, at p. 30, fn. 8, this issue affects the following seven cases:

(1) 69 C 1362; (2) 69 C 1363; (3) 72 C 587; (4) 72 C 588; (5) 72 C 598; (6) 72 C 601; (7) 72 C 602.

In addition, the issue may affect the outcome of 72 C 600, discussed by defendant at p. 32 of its brief, where the second mailing is inscribed as follows: "this letter received approx. July 10, 1969" (1172a).

tween mailers who date their material and those who do not. The district court concluded that there was a "semantic slip in the phrasing of subdivision (f), for the meaning of the statute is unmistakable." (107a). The court reasoned that "[t]he use of the thirty days presumption period in exact correspondence with the thirty day period that precedes the effective date of the Prohibitory Order is the key to the meaning. If the offending mailing is shown to have been received after the effective date of the Prohibitory Order, it is *presumptively* a violation. The presumption is rebuttable from the defendant's mailing records." *Id.* (Emphasis added.)

The district court concluded that defendant's literal reading of subdivision (f) produced "an effect that defeats the obvious meaning and purpose" of the statute as a whole. (p. 105a). In such a case, a court can conclude that certain words, or indeed whole sections, only appear in a statute through Congressional oversight. *Betts* v. *Weinberger*, 391 F. Supp. 1122 (D. Vt. 1975) (three judge court), aff'd 96 S. Ct. 388 (1975).

POINT V

The District Court did not commit error in holding that defendant was not denied due process by reason of the conduct of the administrative proceedings.[18]

Defendant first attacks, in Point IX of its brief, the administrative proceedings by stating that the administrative complaints, issued after the violative second mailings and, of course, after the prior issuance of prohibitory orders, were fatally defective if all exhibits referred to

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[18] Points IX, X, and XI of defendant's brief are discussed herein.

therein were not attached. (Defendant-appellant's brief, p. 36). The complaints, in and of themselves, show the name of the complaining addressee, the date of receipt of a prohibitory order, the docket number, and they state that that order has been violated. (8a, 143a, 224a, 332a, 429a, 511a, 592a, 688a, 781a, 879a, 1001a, 1089a, 1171a, 1258a, 1349a, 1448a, 1537a, 1627a, 1728a, 1830a.) Thus, even assuming that *no* exhibits [19] were attached to the complaints, defendant was effectively apprised of the "nature and cause of the accusations against it." (Defendant-appellant's brief, p. 36.) Defendant, having previously described the extent to which its operations are controlled by computers, cannot now be heard to say that the information contained in the complaints was insufficient to enable it to find whatever rebuttal evidence it wished to present as to the existence or date of second mailings. To date defendant has presented no such evidence.

Defendant nevertheless rests its claim of "failure to give adequate notice of charges" on the allegation that certain of the complaints did not have second mailing envelopes and some part of the advertising brochure attached. (Defendant-appellant's brief, p. 36.) Those allegations, which contradict the indication of the administrative complaints that exhibits are attached thereto, do not appear to meet the requirements of Rule 56(e) that "supporting and opposing affidavits shall be made on personal knowledge." The allegations are contained either in the affidavit of Herbert Monte Levy, attorney for defendant, or Richard Schwartz, Secretary of Pent-R-Books. Neither alleges that he opened the complaint when it arrived in the possession of Pent-R-Books. Furthermore, however, as the district court noted at p. 2 of *United States* v. *Pent-R-Books*, 72 C 583 (not involved

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[19] Defendant alleges this, at p. 36 of its brief, only as to 72 C 584.

in this appeal), even if defendant is correct, "that defect was not fatal . . . omission of the second mailing exhibit was not an administrative finality but a manifestly inadvertent omission. The Post Office was not required to proffer its evidence with its charge, although to do so would evidently expedite the matter. The complaint without the exhibit . . . is scarcely more stark than the official forms provided in the Rules of Civil Procedure." [20]

Secondly, defendant contends it was denied due process because it was improperly denied administrative hearings in some of the cases at bar. Subdivision (d) of the statute provides that the administrative complaint shall "request that any response thereto be filed in writing with the Postal Service within fifteen days after the date" of service upon the mailer. Defendant contests the ruling of the Postal Service that requests for hearings are filed when they are received by that part of the Postal Service to which they were addressed.

In none of the cases-at-bar does defendant contend that its request for a hearing was received by the relevant Postal official within fifteen days of receipt of the complaint. Rather, it appears to contend in part (a) of Point X of its brief, that there should be an irrebutable presumption that the Postal Service delivers mail within one day, so that all requests mailed within fourteen days are deemed received by the Postal Service within fifteen days. Defendant cites no authority for this presumption, nor does defendant attempt to reconcile it with its contention, in Point VIII of its brief, that when its mail is addressed to complaining addressees, there is a presumption that it is delivered no sooner than thirty days, and that presumption is rebuttable.

With respect to defendant's contention, in part (c) of Point X of its brief, that request for a hearing mailed on

[20] A copy of the opinion in 72 C 583 is appended hereto as an addendum. See p. ~~29~~ 28 *infra*.

the fifteenth day after receipt of the complaint is timely filed with the Postal Service, the district court noted, at p. 10 of *United States* v. *Pent-R-Books*, 72 C 609, (not involved in this appeal), that "[t]he language of the statute might conceivably bear such an interpretation, but the regulations from the first (April 19, 1968, 33 C.F.R. § 916.3) and now (39 C.F.R. § 916.3) plainly require filing with the postmaster issuing the complaint, and the complaint form fairly warns the mailer of that requirement. Such regulations not only interpret the statute and are entitled to respect as interpretation but also implement it, if its meaning is doubtful, in a lawful manner. See 39 U.S.C. § 501(1))." [21]

More important, however, is the district court's holding that the failure to hold administrative hearings, as well as the denial of administrative appeals of that failure, was harmless error. This holding was based on the requests for hearings,[22] which were part of the administrative record before the district court, and which contained a recital by the defendant of the points it intended to raise at a hearing. These requests for hearings contain no points of substance which the defendant intended to raise there and could not raise later in the court proceedings.[23]

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[21] A copy of the opinion in 72 C 609 is appended hereto as an addendum. See p. 10a *infra*.

[22] See footnote 15 *supra*.

[23] It should be specifically noted that none of the requests for hearings raised as an issue whether the date used to determine that the second mailing was violative was a date notation made by the addressee and whether it reflected date of receipt rather than some other date. In three of those six cases where defendant alleges (though not on personal knowledge as required by Rule 56(e)) that the envelope of the second mailing was not attached to the complaint, the date notation in the administrative record was unambiguous. See 595a, 693a, 695a, 88a. In a fourth, while it was marked "received approximately," it was clearly marked by the addressee and the date refers to receipt by him (1172a).

In *Rowan* v. *United States Post Office Department*, *supra*, 397 U.S. at 739, the Supreme Court noted that the purpose of the *administrative* hearing was merely to allow the mailer to "question whether the initial material mailed to the addressee was an advertisement and whether he sent any subsequent mailings." The Court emphasized that "a second hearing is required if an order is to be entered." *Id.* Thus, any evidence not presented at the administrative hearing could be presented before the district court. Defendant, of course, has failed to produce any such evidence.

POINT VI

The District Court did not commit error in holding that there was no genuine issue as to the date of receipt of prohibitory orders in the cases at bar.[24]

Defendant alleges, at p. 42 of its brief, that in the following six cases the return receipts signed by the defendant itself do not prove that the prohibitory orders were received on the dates given: (1) 72 C 582; (2) 72 C 584; (3) 72 C 588; (4) 72 C 602; (5) 72 C 606; (6) 72 C 610. The defendant apparently does not deny *receipt* of the prohibitory orders at some time. (Defendant-appellant's brief, p. 43).

But again defendant has not met the requirements of Rule 56(e) in rebutting the evidence produced by plaintiff by "setting forth specific facts showing there is a genuine issue for trial." In fact, defendant has presented an affidavit from a messenger who admits he signed the receipts in question in connection with his duty of picking up registered mail. (574a-576a).

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[24] Point XII of defendant's brief is discussed herein.

The district court dealt with this problem at pp. 7-8 of its opinion in *United States* v. *Pent-R-Books*, 72 C 609:

> "In the absence of any suggestion that the Prohibitory Order was not in fact received, the absence from the administrative record of an explicit and self-evident cross-reference between receipt and Prohibitory Order is not of moment. The receipt is produced from official custody as the relevant receipt in association with the Prohibitory Order. Its date is appropriate, the signature is not challenged, the presence of the Prohibitory Order in defendant's files is not denied. That there might be confusion in the Post Office files does not support an inference that any particular receipt is in a false association."

As the district court implied in the language quoted above, the production of a signed return receipt from official custody cannot be attacked as *per se* unworthy evidence. The evidence offered by the defendant does not *deny* the receipt of the prohibitory orders on the dates in question.

Furthermore, the time has long past when any supposed confusion on this point could be cleared up by evidence proffered by defendant. There is no genuine issue for trial on this point.

POINT VII

The District Court did not commit error in holding that all prohibitory orders in the cases at bar sufficiently identified the persons to whom second mailings could not be made.[25]

Defendant asserts, at p. 44 of its brief, that in 72 C 598 and 72 C 606, the prohibitory orders were null because "the space in the form for insertion of the name" was left blank. But in both cases the objection is spurious, since the name appears elsewhere on the prohibitory order, which is a one-page document. (1004a, 1540a.)

The district court disposed of the objection in the following manner, at 1617a-1618a:

> " * * * if it were possible to say that the blunder could have misled the mailer, there would be much to the point, of course. But 'H. J. Malaison,' at the same address, is given above on the form as the person to whom defendant had mailed the first letter, and, hence, omission to insert the name below could not leave defendant in any doubt about the command of the Prohibitory Order with respect to further mailings."

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[25] Point XIII of defendant's brief is discussed herein.

POINT VIII

The District Court did not commit error in holding that the statute prohibits mailing to the named addressees at an address which varies slightly from that in the prohibitory order.[26]

Defendant contends, at p. 48 of its brief, that in the following five cases, since the second mailings went to addresses that varied slightly from those given in the Prohibitory Orders, the statute cannot apply:

Case	Prohibited Mailing Address	Address on Second Mailing
72 C 611	122 Plantation Drive Houston, Texas 77024 (1743a)	122 Plantation Rd. Houston, Texas 77024 (1729a)
72 C 587	6303 Brightlea Dr. Lanham, Maryland 20801 (787a)	7303 Riverdale Ave. Lanham, Md. J4 20801 (782a)
72 C 588	2203 Beverly Street, Box 3057 Parkersburg, West Virginia 26101 (889a)	Bx. 3057 Parkersburg, W.V. 26103 (880a)
72 C 598	404 Cambridge Circle, Or Box 3647 Halliburton Lafayette, Louisiana 70501 (1004a)	Box 3647 Lafayette, La. 70501 (1002a)
72 C 603	16 Hemlock Trail Trumbull, CT 06611 (1458a)	16 Hemlock Trl. Trumbull, CT 06611 (1455a)

Subdivision (c) of statute provides that the order shall prohibit further mailings "to the designated addresses." The district court interpreted this to include addresses which were so similar "as altogether to eliminate the possibility that the person who received the second mailing was not the one to whom defendant intended to send it." (980a.) The purpose of the statute is to protect the right "to be let alone" of individual addressees, and "[t]he complexity of defendant's business is not a defense against

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[26] Point XV of defendant's brief is discussed herein.

the claim of an individual addressee who has obtained an order directing defendant to make no further mailings to him . . . ." *Id.*

CONCLUSION

This Court should affirm the granting by the District Court of summary judgment in the cases at bar.

Dated: January 27, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
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Assistant United States Attorneys,
Of Counsel.

ADDENDUM

Memorandum and Order Dated July 24, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

PENT-R-BOOKS, INC.,

Defendant.

72 C 583

(Byrnes)

MEMORANDUM AND ORDER

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for Defendant

DOOLING, *D.J.*

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 72 C 609, 69 C 1290 and 72 C 588, and what has been said in those dockets need not be repeated here.

In this case, in which the second mailing was made more than 30 but less than 60 days after the Prohibitory Order was issued (see decision in 69 C 1362), defendant objects, *inter alia*, that the certification is of "POD Docket G.C. No. 7260" whereas in fact the case involved is "P.O. Docket No. CIN-435." However, the papers at-

tached to the certificate form are the papers of the complete CIN-435 docket, and it is not claimed that the copies supplied are false, or that the mailings were not made.

Defendant objects further that no copies of the second mailing were annexed to the complaint sent to it. The administrative record indicates the contrary, but if defendant is correct, that defect was not fatal to the proceeding. Annexing a copy of the second mailing is contemplated by the standard printed form of complaint and it obviously is a convenience to the mailer and must speed up the process. But omission of the second mailing exhibit was not an administrative finality but a manifestly inadvertent omission. The Post Office was not required to proffer its evidence with its charge, although to do so would evidently expedite the matter. See 39 C.F.R. §916.4 (b). The complaint without the exhibit is abrupt and uninformative, but it is simply initiatory process, and it is scarcely more stark than the official complaint forms provided in the Rules of Civil Procedure. See Forms 4-9, 11, and 16.

Defendant has objected that the Post Office ignored defendant's timely mailed request for hearing (see decisions in 69 C 1290 and 72 C 609), and the Postmaster in response to defendant's objection stated by a letter to defendant of July 25, 1969, that the files disclosed no record of the receipt of a request for hearing. The final "Order" had been issued on July 7, 1969. A letter in the administrative file indicates that not until some time on or after July 15, 1969, had the Postmaster learned the date of the second mailing from the recipient Byrnes.

Since it cannot be accepted that a failure of the Post Officer to deliver to itself a correctly addressed and timely and duly posted request for hearing can deprive

a person of a right to a Post Office hearing on a Post Office matter, it was not enough for the Post Office to rely on its non-receipt of a hearing request. Defendant was entitled to an administrative determination of the issue of due and timely mailing of a request for hearing.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted to the extent only of remanding the matter to the Postal Service for an administrative determination as to whether defendant was entitled to a hearing, and if it was, to accord defendant such hearing.

Brooklyn, New York
July 24, 1974.

JOHN F. DOOLING
U.S.D.J.

Memorandum and Order for Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

PENT-R-BOOKS, INC.,

Defendant.

72 C 609
(Hull)

MEMORANDUM AND ORDER FOR JUDGMENT

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for Defendant

DOOLING, *D.J.*

As in 69 C 1362, the Government moves for judgment on the administrative record and the defendant cross-moves for summary judgment on affidavits.

The administrative record authorizes the following findings of fact:

Some time before May 5, 1969, defendant mailed to "Mr. Dick Hull, 902 Sparks St., Twin Falls, Id. 83301" what is described on the envelope as an "UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only a new marriage mannual. . . ." Mr. Dick Hull was, according to his father's later assertion to the Post Office, sixteen years old. The Post Office received over the signature of Mr. Dick Hull a printed form of statement dated May 5, 1969, that he considered the "mailing to

be a pandering advertisement" etc., in the statutory language and requested that the mailer (Pent-R-Books) be directed to refrain from making any further mailings to him. Under date of May 23, 1939, the Acting Postmaster, Portland, Oregon, sent a Prohibitory Order to defendant in the standard printed form ordering it to refrain from further mailings to "Mr. Dick Hull . . . 902 Sparks Street . . . Twin Falls . . . Idaho . . . 83301."

It is not denied that defendant received the Prohibitory Order, but it is pointed out that the return receipt signed by defendant and dated May 27, 1969, is not shown by the Administrative record, as supplied to the Court by the Post Office, to be the return receipt related to the Hull Prohibitory Order.

A second mailing of the same kind of advertisment was made by defendant to "Mr. Dick Hull, 902 Sparks Street, Twin Falls, Id. 83301." Mr. Dick Hull's father, Mr. John F. Hull, turned the mailing over to the Post Office and signed a "Notice for Prohibitory Order" asserting that as parent of the minor addressee he considered the mailing a pandering advertisement etc. in the statutory language, and he requested that the mailer be directed to refrain from further "mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday]." Dick Hull was listed with a birth date of January 5, 1953. Mr. John Hull stated to the Post Office in writing that the second mailing was received on September 30, 1969.

A Complaint (not a second Prohibitory Order) was mailed to defendant under date of October 23, 1969, and defendant receipted for it on October 28, 1969. The complaint advised that any request for hearing "must be filed in the Office of the undersigned Postmaster within fifteen (15) days after receipt of this Complaint."

Defendant asserts, without contradiction, that it requested a hearing by counsel's communication dated and mailed November 6, 1969. The request was correctly addressed, and it gave the Post Office docket number correctly, as well as the last name of the addressee.

The administrative record does not disclose receipt of any notice of hearing by the Post Office, nor does it appear from the record that any hearing was granted.

Under date of December 22, 1969, the Post Office issued its "Order" to the effect that, satisfactory evidence having been presented that defendant acted in violation of the Prohibitory Order, the Attorney General was being requested to give consideration to applying to a District Court for an Order directing compliance with the Prohibitory Order. The present action, filed May 9, 1972, followed.

Defendant asserts, without contradiction that the Post Office advised him in the Hull case (and in other cases) that he was not accorded a hearing because the Post Office had not received defendant's request within fifteen days after defendant received the Complaint.

1. Defendant contends that Dick Hull, as a minor, could not effectively request a Prohibitory Order. On that basis, defendant asserts that the proceeding must be dismissed as based on an invalid Prohibitory Order.

The statute does not in terms deny to minors the right to make their own decisions about the mailings they are willing to receive. They may be supposed to form a class likely to be embarrassed in their family relations by the receipt of such mailings and able to profit by using such a statutory right. No contrary inference is to be drawn from the fact that parent-addressees may, under subdivision (g), request extension of any Prohibitory Order to

which they may themselves be entitled to include their children under age nineteen who reside with the parent-addressees.

2. It will be evident that Mr. Dick Hull is now over nineteen; he is, indeed, over twenty-one. Defendant contends that where a Prohibitory Order is obtained by a parent-addressee and it includes restraint on mailings to children under age nineteen who reside with the parent-addressee, the Prohibitory Order should be considered as expiring as to the child when the child becomes nineteen. For that reason a Compliance Order, it is argued, should not be made in this case. That would seem the plain implication of the statute. Oddly, however, the statute does not provide that, if the offending first mailing is addressed directly to the child, the parents with whom the child resides may request a Prohibitory Order. It provides rather, in subsection (g), that, upon the request of an "addressee," the Prohibitory Order may include a restraint on mailings to named children under nineteen residing with the addressee. The Senate Report (SR 801, 90th Cong., 1st Sess., U.S. Code Congressional and Administrative News, Vol. 2, pp. 2258, 2295) comments that the addressee is the sole judge of the "pandering" element, and whether he desires to receive any further mailings from the sender "either addressed to him or to any minor child of his under the age of 19 years who resides with him." Possibly by inadvertence the statute does not enable the parent to determine the issue for the child where the child is himself the addressee. The Post Office forms simply assume that the parent can act for the addressee child as well as on the parents' behalf.

In the present case, as noted, the child was the addressee and the child himself obtained the Prohibitory Order. The second mailing was again to the child. Under a literal reading of the statute the boy's father was not entitled to request the issuance of a Prohibitory Order

(which, technically, he did request), since he was not the addressee. However, there is no reason to suppose that a parent may not in such matters act for the child as part of the general discharge of parental responsibilities until, at least, the child reaches an age at which its individual rights to act for itself in matters of conscience are thought to become of paramount importance.

But so far as the second mailing was concerned, the statute authorizes the Post Office to act when it believes, on the basis of information received from any source, that there has been a second mailing. So, in the present case, the Post Office acted within its statutory authority in issuing the Complaint. Since the minor was himself the one who requested the Prohibitory Order, his coming of age is immaterial.

3. In the absence of any suggestion that the Prohibitory Order was not in fact received, the absence from the administrative record of an explicit and self-evident cross reference between receipt and Prohibitory Order is not of moment. The receipt is produced from official custody as the relevant receipt in association with the Prohibitory Order. Its date is appropriate, the signature is not challenged, the presence of the Prohibitory Order in defendant's files is not denied. That there might be confusion in the Post Office files does not support an inference that any particular receipt is in a false association.

In the particular case, the Hull case, defendant's request for hearing removes the issue from debate. That request does not assert non-receipt of the Prohibitory Order as a ground of objection to the Complaint of violation. (Contrast the situation in 72 C 584.)

4. The administrative record supports only one inference, that defendant received the Complaint not earlier

than October 28, 1969. It mailed its hearing request on November 6, 1969, which would appear to allow ample time for it to have reached Portland, Oregon by the filing due date of November 12, 1969.

The Post Office can insist on literal compliance with statute; it speaks of filing within 15 days from the date of receipt of the Complaint. There appears to be no counterpart in the postal laws to 26 U.S.C. § 7502 (treating the mailing date as the filing date for tax returns, payments, etc.). *Cf. Real Estate Corp.* v. *Commissioner*, 10th Cir. 1962, 301 F.2d 422, 428. But there seems practical reason to conclude at minimum that a mailing in good season for delivery on or before the filing dead-line must satisfy the filing requirement. In the present case a mailing on November 6, 1969, if it took place on that date, would appear to be timely.* *Cf. Max Kralstein*, 1962, 38 T.C. 810, 819-820 (implying that a demonstration by the Commissioner of late receipt of a timely mailing would precipitate liability). And it is additionally noted that it is most appropriate to apply such a rule where the Post Office itself is the party both requiring the filing and charged with the duty to deliver the letter containing the hearing request to the interested postmaster.

It must, therefore, be concluded that the Post Office was not at liberty to ignore the request for hearing. If the notice was received on a date that appeared late to the Post Office, it should have so stated of record, affording defendant an opportunity to explain the apparent lateness in filing. It is not to be inferred that the 15 day requirement of the statute is mandatory and the filing a "jurisdictional" requirement. The statutory language is not peremptory in structure or in word choice.

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* Apparently the Complaint was not more than five days in transit and the Prohibitory Order four days in transit.

5. Defendant argues the bolder proposition that a mailing on the fifteenth day ought to suffice since it is in one sense a delivery of the hearing request to the Postal Service (or the Postmaster General under the earlier statutory language). The language of the statute might conceivably bear such an interpretation, but the regulations from the first (April 19, 1968, 33 F.R. 6013, 39 C.F.R. § 916.3 *) and now (39 C.F.R. 916.3) plainly require filing with the postmaster issuing the complaint, and the Complaint form fairly warns the mailer of that requirement. Such regulations not only interpret the statute and are entitled to respect as interpretation but also implement it, if its meaning is doubtful, in a lawful manner. See 39 U.S.C. § 501(1).

Other points argued for defendant were disposed of in 69 C 1362 (Ireland).

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment is denied and the motion of defendant for summary judgment is granted to the extent only that the matter is remanded to the Postal Service for the purpose of determining whether defendant mailed a request for hearing at such time that it would in ordinary course of post have been received by the Postmaster at Portland, Oregon, on or before November 12, 1969, and, if so, to accord defendant a statutory hearing.

Brooklyn, New York

July 23, 1974.

JOHN F. DOOLING
U.S.D.J.

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* The advance copy of the regulations and forms circulated by the Post Office (POD Publication 124 of April 1968) numbered the regulations § 956.1 *et seq.*

AFFIDAVIT OF MAILING

State of New York)
County of Kings) ss
Eastern District of New York)

David W. McMorrow being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 27th day of January 1976 he served a copy of the within Brief for the Appellee by placing the same in a properly postpaid franked envelope addressed to:

Herbert Monte Levy, Esq.
295 Madison Avenue
New York, N. Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

DAVID W. MCMORROW

Sworn to before me this
27th day of January 1976

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 30th day of January 1976 he served two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Herbert Monte Levy, Esq.
295 Madison Avenue
New York, N. Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

30th day of January 1976

[illegible]
[illegible]
Notary Public, State of New York
No. [illegible]
Qualified in Kings County
Commission Expires March 30, 1977